Supreme Court
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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM 1955

No. 876

THOMAS F. DALEY,
Defendant, Appellant
v.
UNITED STATES OF AMERICA,
Appellee;

ARTHUR F. DUNNETT, JR. *v.* SAME;
LOUIS FRONGELLO, ALIAS *v.* SAME;
JAMES J. PALMISANO *v.* SAME;
EDWARD LAVALLE *v.* SAME;
ANGELO ROSSETTI *v.* SAME;
FRANCIS J. JUDD *v.* SAME.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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SUBJECT INDEX.

	Page
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	10
Conclusion	17
Appendix A	18
Opinion of the Court, March 30, 1956.	

CITATIONS.

F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 193 Fed. Rep.(2) 162	10
F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. p. 228	11
Crowe et al v. *DiManno*, 225 Fed.Rep.(2) p. 652	11
Quercia v. *U. S.*, 289 U.S. 466	13
United States v. *Brandt*, 196 Fed.(2) 653, 655-6	13
Sacker v. *U. S.*, 343 U.S. 1, 23	14
Nardone v. *U. S.*, 308 U.S. at 338	15
Cataneo v. *U. S.*, 167 F.2d 820	16
U. S. v. *Dietrich*, 126 F. 664	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners prays that a writ of certiorari issue to review the judgment of the United States Courts of Appeals for the First Circuit, entered in the above-entitled case on March 30, 1956.

Citation to Opinion Below

The opinion of the Court of Appeals for the First Circuit, printed as Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on March 30, 1956. The jurisdiction of this Court is invoked under 28 U S.C. Sec. 1254 (1).

Questions Presented

1. Whether the Reversal of a Criminal Conviction Should Be Granted by Reason of the Unfair Conduct of the Trial in the District Court Because the Judge

(a) Acted not as a Judge, but as a prosecuting attorney.
(b) By his conduct, created a courtroom atmosphere that did not permit the guilt or innocence of the defendants to be soberly and fairly tested.
(c) By his constant interruption of counsel and the discussions with counsel he cut into the presumption of innocence to which the defendants were entitled.

2. Did the Court Commit Reversible Error in Allowing a Motion to Consolidate the Seven Informations for Trial.

Constitutional Provision Involved

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment, (Rights of Citizens) Constitution of the United States, Sec. 1.

Statement of the Case

On September 20, 1954, the United States Attorney for the District of Massachusetts, filed a criminal information in two counts charging each defendant on or about May 29, 1953, "did engage in the business of accepting wagers and

of conducting a lottery and of conducting a wagering pool as defined in 26 U.S.C. Sec. 3288, without paying the special occupational tax as required by law. The second count charged a failure to register as required by law. On January 11, 1955 the Court allowed the Government's motion to consolidate. The trial started the following day, January 12, 1955 and continued for a period of around fourteen days. Each defendant was found guilty and received jail sentences, plus a fine on the first count and on the second count a fine and a jail sentence, the jail sentence being suspended and to start on the completion of the term of imprisonment under Count 1.

THE TRIAL JUDGE ACTED NOT AS A JUDGE, BUT AS A PROSECUTING OFFICER.

This case was hardly under way, when after a few preliminary questions to one John Horkum, the Judge proceeded to take over the duties of the prosecuting attorney and examine Horkum. The following appears on Page 26 of Consolidated Record Appendix to Brief for Appellants.

The Court: Did you ask him what the name of the club was?

The Witness: No.

The Court: Why didn't you if you owned the property?

The Witness: Your Honor, I don't pay attention. I don't ask him.

The Court: Weren't you concerned with the purpose and use of that club by seven or eight men?

The Witness: I just—

The Court: Weren't you?

The Court: How large was the room in the cellar?

The Witness: Oh, I can say it would be 8 by 9.

Page 29 of the Record.

The Court: When you gave your name you knew the telephone wasn't for your benefit but for the benefit of Monge, isn't that right?

The Court: You knew that, didn't you? You didn't need the telephone for your use. You already had one.

The Witness: I need it because lots of times—

The Court: You never asked to have a telephone put in your office until that man came and asked you to make arrangements to do it, isn't that right?

The Witness: I have—

The Court: Isn't that right?

The Witness: That's right.

The Court: That's right. And how long had you owned that property and how long had you conducted that business?

The Witness: Four years.

The Court: For four years you never had occasion to ask for a telephone until Monge requested you to put it in, isn't that right?

The Witness: That is right.

Again on Page 33 of the Record when witness Samuel Rubin was called.

The Court: Were they installed by the Telephone Company under your direction—these phones?

The Witness: No, sir.

The Court: You didn't install them?

The Witness: No, sir.

The Court: You never ordered them?

The Witness: No, sir.

The Court: They would have to be. You were a subscriber?

The Witness: Yes, sir.

The Court: You didn't ask to have them installed?

Mr. Thompson: Just a minute, please, please.

The Court: Now, wait a minute.

Mr. Thompson: I object to this line of cross-examination by your Honor.

The Court: You didn't order them?

The Witness: No sir.

The Court: He says he never ordered the Telephone Company to install the jacks.

Again on Page 35 of the Record.

Mr. Thompson: If this examination is continued by your Honor I'm going to ask for a mistrial right here.

The Court: Well, I'm not going to grant it.

Again on Page 37 of the Record.

The Court: As a result of your investigation did you know that that telephone was being used for some other purpose from what you intended having it used for in your business?

The Witness: Yes, sir.

The Court: Did you ever notify the Telephone Company?

The Witness: No, sir.

The Court: Why not? Would you give this jury a reason why you didn't?

The Witness: Yes, I can. I talked it over with my wife and—

The Court: You decided you wouldn't do it?

The Witness: I decided to get out of there.

Page 39 of the Record.

The Court: Why didn't you report it to the police?

The Witness: I was afraid to, I guess, sir.

The Court: *You* were afraid.

The Witness: Yes, sir.

The Court: That's the reason why you didn't. That's the true answer, isn't it?

The Witness: Yes, sir; yes, sir.

The Court: You didn't do it because you were afraid to do it. And when you use the term "afraid" you mean physical fear; isn't that right?

The Witness: No, sir, mental fear, sir.

The Court: That is, you were afraid it was being used for an illegal purpose; isn't that right.

The Witness: Yes; and I was happy to get out of there.

The Court: No matter how you got the information it was your determined judgment it was used for that.

The Witness: Yes, sir.

The Court: And you were afraid to report it because of fear of physical harm that might come to you?

The Witness: No, sir, I wouldn't say physical harm, sir.

The Court: Well you were in mental fear?

The Witness: That's right, sir. I was afraid to be involved.

The Court: And the mental fear arose from the fact that if you did tell the police some harm would come to you?

The Witness: I would be involved.

HIS CONDUCT CREATED A COURT ROOM ATMOSPHERE THAT DID NOT PERMIT THE GUILT OR INNOCENCE OF THE DEFENDANTS TO BE SOBERLY AND FAIRLY TESTED.

In addition to what has been set forth under sub heading (a) we have the following appearing on Page 51 of the Record.

The Court: Now please, I am the Judge, I am making the rulings of law and nobody else. The question before this Court and jury is whether or not these defendants were engaged in a business in contravention of a statute of the United States. That is one of the questions before the jury now. I am instructing them.

Again on Page 57 of the Record we find the following:

The Court: An officer is like a good soldier, he has to do what he is told. I have a great deal of respect for the distinguished Chief of Police of Cambridge. He is an honorable, honest man, there is not a bit of doubt about it, in my mind.

The Court: I don't want the testimony to stand so that there would be a cloud placed around the shoulder of a man I consider a wonderful Chief of Police, that is the Chief of Police of the City of Cambridge.

Again on Page 61 of the Record we find the following:

The Court: There was an indication he has been moved out, put in uniform. I am going to ask him to explain that when it is over. He had a right to. It is in the line of duty for an officer to be obedient to his superior. He is an excellent superior, the Chief of Police in Cambridge.

Again on pages 94 and 95 of the Record we find the following:

Mr. Thompson: You say, you told my brother here that the only person you knew was Rossetti? A. That's true.

X-Q. And that means you never seen any—

The Court: No.

Mr. Thompson: This is cross examination.

The Court: Mr. Thompson I forbid you to ask that

question again. It is excluded, and you are to disregard it.

Mr. Thompson: All right.

The Court: It is thoroughly incompetent.

Mr. Thompson: I am going to call time. I am filing my motion now.

The Court: You can file your motion right away. File it immediately. Mr. Clerk, you may take the motion and impound it, and I don't care to read it. I will deny it. The motion is denied. The motion is impounded. The motion is denied.

BY HIS CONSTANT INTERRUPTION OF COUNSEL AND THE DISCUSSIONS WITH COUNSEL CUT INTO THE PRESUMPTION OF INNOCENCE TO WHICH THE DEFENDANTS WERE ENTITLED.

Attention is called to the Record, page 134.

The Court: Wait a minute, please. I am going to ask this question in open court. Are you going to offer evidence—I want it made a part of the record in view of the questions that are being asked. Are you going to offer evidence that these exhibits that have been offered here, which allegedly came from this 560, whatever that avenue is, are a recent invention and they are not the papers that were taken.

Again on Page 147 of the Record.

The Court: Your rights are regulated by me, and again I don't want to get into any comment. You must subscribe to the rule as laid down by this Court. I talked to both counsel very nicely. Mr. Thompson on several occasions last Friday said "Your Honor is wrong on the law." He knows better than anyone else that was a very, very improper statement to make. He

knows that better than anyone. And I am not going to permit any of those statements to be made. They are wrong, and I am not going to permit any further cross-examination. The weight of it is for the jury, the jury knows how to proceed, and it is for them to say whether they are or not.

Any attempt to catalogue every instance of prejudice interjected into this case by the trial judge, either in his comments on the evidence, in his hostile cross-examination of witnesses—his continual interruption of counsel and his comments about the Chief of Police at Cambridge are specific instances for this Court to see what was taking place during the trial of the case, would only prolong this petition. The record is replete with them.

Point 2.

Did the Court Commit Reversible Error in Allowing a Motion to Consolidate the Seven Informations Into One for Trial Purposes.

This presents an interesting point in procedure in the trial of a criminal case. The United States Attorney filed seven separate criminal informations against the defendants. This was on September 20, 1954. On the 29th day of December, 1954 the Government moved to consolidate the informations. This motion was not allowed until January 11, 1955, and on the following day, January 12, 1955, the defendants were put to the bar for trial. All during the early part of the trial the attorneys for the defendants were left in the air as to how the Court would act and it was not until the case was well underway that he said he was treating it as a joint enterprise.

Reasons for Granting the Writ

This case presents an important question, viz, did the Judge's conduct during the trial of this case impair and destroy defendants fundamental right to a fair and impartial trial.

The present case is one of three cases presided over by this same Judge, where the claim has been made that his conduct, his continual interruption of the orderly process of the trial, and his forensic misconduct resulted in harm to the parties, in that they were not given the fair, impartial trial that our law says they are entitled to.

Also the question of the consolidation of the informations. This presents a question that calls for a determination by this Court as to when it is proper to consolidate for the purpose of trial.

We call attention of the Court to the case of *F. W. Woolworth Co.*, v. *Contemporary Arts, Inc.*, 193 Fed. Rep. (2) 162. This case arose in the First Circuit and the Court said:

> "As to the criticisms of the trial judge, we are bound to say that certain of his remarks in the course of the proceeding were both unseemly and uncalled for. It is the duty of the trial judge not only to afford the parties a fair trial, but also to conduct the proceedings with such poise and dignity and evident impartiality that, so far as is reasonably possible, the parties may leave the court room with a feeling that they have been given a fair trial. But after a careful consideration of the record as a whole, we have concluded that the particular remarks of the judge would better have been left unsaid, and are better not quoted, do not rise to the seriousness of reversible error."

The Supreme Court granted certiorari and in an opinion found in 344 U.S. p. 228. The lower Court was sustained. However, in a dissent joined in by Justices Black and Frankfurter it was said:

> "We accept the Court of Appeals appraisal of the consequences of the judges remarks on the factual issue of copyright infringement. But here the trial judge gave judgment for statutory damages in an amount that smacks of punative qualities. And this Court has held that the amount of such damages is committed to the unreviewable discretion of a trial judge. In view of the remarks of the trial judge directed against the Woolworth Company we think it had a just right to complain that the amount of damages imposed ought not to stand. We would reverse and remand this case for a new trial by another judge."

In *Crowe et al* v. *DiManno,* decided September 15, 1955 and reported in 225 Fed. Rep. (2) p. 652 the conduct of this same Judge was the subject of an appeal, it being the contention of the appellant that the unfair conduct of the District Judge throughout the trial so seriously prejudiced them in presenting their case to the jury that they were deprived of their right to a fair and impartial trial. It was a personal injury case and in reversing it the Court of Appeals said

> "Projected against this background the trial judge's frequent protestations of fairness and impartiality in his rulings, matters which should be so evident as not to require mention, to say nothing of reiteration, sound hollow indeed. Furthermore, such remarks serve to emphasize the prejudice to the defendants of the rulings against them which purport to rest on an exercise of the court's discretion.

"We could prolong this opinion to great length by the citation of many other instances of unfairness to the defendants on the part of the trial judge. To do so, however, would serve no useful purpose. It will be enough to remark in summary that it goes without saying that in all cases, and particularly in cases such as this involving the pathetic dismemberment of a young woman of twenty, it is the trial judge's most solemn duty to see that the defendant has a fair opportunity to present his side of the case to the jury. After all, heart moving as a plaintiff's injury may be, they may not have been caused by the defendant's fault. In this case Judge McCarthy signally failed in his duty. For, in addition to the instances of unfair conduct already mentioned, he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff. And in that role he repeatedly exceeded the proper bounds of advocacy by asking witnesses not merely highly argumentative questions, but questions so leading as not really to be questions at all but statements of fact, often consistently slanted in the plaintiff's favor, which he followed by 'Didn't you?' 'Isn't that right?' or some similar phrase. In short, the record indicates that the judge throughout the trial openly exhibited a partisan zeal for the plaintiff wholly out of keeping with his office which deprived the defendants of their fundamental right to a fair and impartial trial. We must order a new trial before another judge."

It is hard to reconcile this language with the language used in the opinion in the instant case, which is a case involving not money, but the liberty of the defendants. A close study of the record shows the same pattern in both cases, questioning by the Judge, comments on the witnesses

reply to the questions, leading questions and the use on more than one occasion of the words "We are not living in a fool's paradise". Record pp. 193-195-211.

In *Quercia* v. *United States*, 289 U.S. 466, 469, which came up on certiorari from the same Court, the First Circuit, the Court said

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided' that 'deductions and theories not warranted by the evidence should be studiously avoided.' *Starr* v. *U. S.*, 153 U.S. 614, 626; *Hickory* v. *U. S.*, 160 U.S. 408, 421-423".

In *United States* v. *Brandt*, 196 Fed.(2d) 653, 655, 656 (C.A. 2, 1952) the Court said:

> "A trial judge conducting a case before a jury in the U. S. Courts, is more than a mere 'moderator', *Quercia*

v. *U. S.*, supra, but he is decidedly not a 'prosecuting attorney' *U. S.* v. *Gertler*, 2 Cir. 147 Fed.(2d) 796. He enjoys the perogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues. To this end he may call witnesses on his own motion, adduce evidence, and himself examine those who testify. *Young* v. *U. S.*, 107, Fed.(2) 490. But he nonetheless must remain the judge, impartial, judicious, and above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence."

In the recent case of *Sacker* v. *U. S.*, 343 U.S. 1, 23, Mr. Justice Frankfurter stated

"Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice. If the conditions for a society of free men formulated in our Bill of Rights are not to be turned into mere rhetoric, independent and impartial courts must be available for their enforcement— Time out of mind this Court has reversed convictions for the most heinous offense, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of society . . . due regard for such procedural questions, too often conceived as

narrow and technical, alone justifies the truth of one of the great boasts of our democracy, the essential fairness of our judicial system."

Again in the case of *Nardone* v. *U. S.*, 308 U.S. at 338, the same Justice said

"Such a system of ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal district judges."

Examining the record and the remarks of Judge McCarthy made over a period of fourteen days of trial, can it be fairly argued that the defendants were given the fair, impartial trial that they are entitled to under our system?

Point 2.

Did the Court Commit Reversible Error in Allowing a Motion to Consolidate the Seven Informations for Trial Purposes.

Under our Federal Criminal Rules, Rule 8, provides for the joinder of offenses, whether felonies or misdemeanors or both, if the offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 13 provides that the court may order two or more indictments or informations or both to be tried together if
• • •

In the present situation seven men were separately prosecuted by way of a criminal information for having failed personally to register and secure a stamp under the statute. On the Government's motion the court allowed its motion

to consolidate, to which the defendant's objected. It is indicated by the record that the government in its opening went on the assumption that the cases would be tried and construed as seven separate trials and that particular evidence would be applied to a particular defendant. All this was wiped away however, by the Court in its remarks as appear on Pages 165 and 166 of the Record, where the Court said during one of its frequent and lengthy digressions, "I am going to charge, I told you what I am going to do on that, they will have a yardstick, this is a common design and purpose. I am not going to go into that any further. I have indicated what I am going to do."

In rejecting the appellant's claim of error the Court said "So far as the record discloses none of the defendants made any move for the relief afforded under Rule 14, which provides that if it appears "that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

One would be naive indeed, to believe that having ordered a consolidation on January 11th, and the trial to commence the next day, that the Court would even entertain such a motion. And as the Court said in the *Catanco* case, cited in the Court of Appeals opinion

> "When consolidation is permissible under the formal requirements of Rules 8-13 Federal Rules of Criminal Procedure, the question of severance or common trials is vested under Rule 14 in the sound discretion of the trial judge and his decision will be reversed on appeal only upon a clear abuse of that discretion."

Although it might have been possible for the individual defendants to have been joined in a conspiracy charge, this was not done. It was impossible according to the information, for the defendants "to have participated in the same act or transaction constituting the same offenses". The fact that each committed a similar offense, but not the same does not warrant consolidation. Persons who merely commit similar crimes but not the same crime cannot be joined *U. S.* v. *Dietrich*, 126 F. 664, although all may be joined in a charge of simple conspiracy. If each cannot be properly joined, then they cannot be joined for trial.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 4973.

THOMAS F. DALEY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 4974.

ARTHUR F. DUNNETT, JR., *v.* SAME;

No. 4975.

LOUIS FRONGELLO, ALIAS *v.* SAME;

No. 4976.

JAMES J. PALMISANO *v.* SAME;

No. 4977.

EDWARD LAVALLE *v.* SAME;

No. 4978.

ANGELO ROSSETTI *v.* SAME; and

No. 4979.

FRANCIS J. JUDD *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alfred Sigel and *Edward F. McLaughlin, Jr.*, for appellants.
David E. Place, Special Assistant to the U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

March 30, 1956.

MAGRUDER, *Chief Judge.* A separate information was filed in the court below against each of the seven appellants herein. The informations, which were identical except for the names of the respective defendants, were each in two counts. Count 1 charged that the accused, on or about May 29, 1953, at Revere, in the District of Massachusetts, "did engage in the business of accepting wagers and of conducting a lottery and of conducting a wagering pool, as defined in 26 U.S.C. 3285, and did wilfully fail prior to the commencement of said business engagements to pay the special occupational tax as required by 28 U.S.C. 3290, . . . in violation of 26 U.S.C. 3294 and 2707(b)." Count 2 charged that the accused, on or about May 29, 1953, at Revere, Mass., "did engage in the business of accepting wagers and of conducting a lottery and of conducting a wagering pool, as defined in 26 U.S.C. 3285, and did wilfully fail prior to the commencement of said business engagements to register as required by 26 U.S.C. 3291, in violation of 26 U.S.C. 3294 and 2707(b)."

Upon motion of the government, allowed by the district court, the seven informations were consolidated for trial. After a lengthy trial the jury reported verdicts of guilty on all counts, and these appeals were taken from the ensuing judgments of conviction.

The district judge repeatedly explained to the jury that the act of Congress in question did not denounce gambling as such, or the participation in a gambling business, as a federal offense; that if the evidence might indicate some gambling offenses against state law, this was wholly irrelevant to the offenses for which the defendants were being tried; that the federal offense was participating in a gambling "business," without having previously paid the special

occupational tax or without having previously registered as required by federal law.

The defendants were not charged with a conspiracy to commit an offense against the United States, but each was charged with technically separate but similar offenses of participating in a gambling "business" without having individually paid the required occupational tax to the United States or without having individually registered with the appropriate federal collector of internal revenue.

The government proved by uncontradicted evidence that no one of the seven defendants had paid the special occupational tax for the year in question, and that no one of the defendants had complied with the registration requirements of 26 U.S.C. § 3291. Therefore, the only other element of the separate offenses which the government had to establish beyond a reasonable doubt was that each of the defendants had engaged in the described gambling "business." In this respect the government sought to show that all seven of the defendants had participated together, on or about May 29, 1953, in the conduct of a single gambling enterprise or "business" at 560 Winthrop Ave., Revere, Mass.—that was the common element of the offenses charged against all seven of the defendants.

Accordingly the United States moved for consolidation of the seven informations for the purpose of trial, under Rule 13 of the Federal Rules of Criminal Procedure, on the ground "that all of the defendants in the above-entitled actions are alleged, in informations filed in this Honorable Court, to have participated in the same act or transaction, or series of acts or transactions, constituting the same offenses . . . ." Appellants contend that the allowance of this motion by the district court was reversible error. We do not agree.

Rule 13 provides that the district court "may order two or more indictments or informations or both to be tried

together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information." This requires a reference back to Rule 8(b), which provides that two or more defendants "may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Considering the participation by the defendants in the same gambling business as "the same act or transaction," is it the same act or transaction "constituting an offense or offenses," within the meaning of Rule 8(b)? In a hypercritical reading of the rule, it may be suggested that proof of a particular defendant's participation in such act or transaction does not of itself establish the offense charged, for this particular defendant might, or might not, have paid the occupational tax, or complied with the registration requirements. But Rules 13 and 8(b) are not to be read so narrowly. See *Cataneo* v. *United States*, 167 F.2d 820 (C.A. 4th, 1948); *Jordan* v. *United States*, 120 F.2d 65 (C.A. 5th, 1941). The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial. Rule 8(b) on its face contemplates the situation where some of the evidence might be admissible against one defendant and not against a codefendant at a single trial, for in its concluding clause the rule provides that "all of the defendants need not be charged in each count." Here, participation by the seven defendants in the gambling business at 560 Winthrop Avenue constituted the concluding element of the two offenses of which they were all charged,

since it was undisputed that none of them had paid the occupational tax or registered. We have no doubt that the district court was empowered under the rules to entertain the motion by the United States for trial of the seven informations together. So far as the record discloses none of the defendants made any move for the relief afforded under Rule 14, which provides that if it appears "that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information *or by such joinder for trial together,* the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." [Italics added.] In the circumstances before us, we cannot say that the district court committed an abuse of discretion in allowing the government's motion under Rule 13. It would have been absurd here to put upon the government the expense and burden of seven separate trials, especially since most of the government's evidence related to the activities at 560 Winthrop Avenue.

The government's case was largely the outcome of persistent efforts by Sergeant Cosgrove of the Cambridge police in discharge of his duty to detect offenses against the criminal laws of the Commonwealth of Massachusetts. For some months prior to the raid by the local police at 560 Winthrop Avenue, Revere, on May 29, 1953, which will be referred to hereinafter, Cosgrove had been engaged in trailing Arthur F. Dunnett, Jr. ("Sonny"), Edward Lavalle ("Eddie"), and James J. Palmisano, all defendants herein, first in Cambridge and later to points outside of Cambridge. These three suspects were seen together in a garage at 90 Broadway, Cambridge, which contained the typical paraphernalia of a gambling establishment. Later these defendants were traced to a location on Ocean Avenue, Revere. Finally the surveillance by the Cambridge police

was shifted to the vicinity of 560 Winthrop Avenue, Revere, a location across the street from the Suffolk Downs race track. There, in addition to Dunnett, Lavalle, and Palmisano, the witnesses observed the presence from time to time, prior to May 29, 1953, of Thomas Daley ("Tom"), once in the company of Angelo Rossetti ("Monge"), they being also two of the defendants in this case.

It was in evidence from the testimony of the witness Horkun that in February, 1953, Rossetti rented from Horkun a small cellar room at 560 Winthrop Avenue, ostensibly for use as a "club." Rossetti paid the first rent; the rent for April and May was paid to Horkun by Dunnett. Two telephones maintained by Horkun in his garage at the location were tapped and the wires run into the cellar room. Also, several other telephones in the neighborhood were similarly tapped, so that the occupants of the cellar room had a total of six or seven telephone lines available for calls in and out. There is not the slightest doubt of this on the evidence.

In the early afternoon of May 29, 1953, Sergeant Cosgrove, accompanied by Detective McNeil of the Cambridge police, visited the Boston office of the District Attorney for Suffolk County. The District Attorney put in a call to the Revere police. As a result of this visit Sergeant Cosgrove and Detective McNeil proceeded to the office of the chief of the Revere police, where certain Revere policemen were assigned to the raiding party, which then set out for 560 Winthrop Avenue. During a brief preliminary surveillance defendant Judd was observed to enter the premises with a cardboard box, later identified as a box containing sandwiches.

The raiding party burst into the cellar room shortly after 4:30 p.m. on May 29. Found in the room at the time were these seven defendants (and no one else), most of them

sitting around a table littered with Armstrong racing sheets, tally sheets, wagering slips, numbers pool charts, adding machines and rolls, pads and pencils, radios, etc. Several of the telephones were ringing. According to the testimony, defendant Daley, answering one of these phones, said, "Out of business, don't you understand." Defendant Dunnett, answering another phone, said, "There will be no more bets on the speed of a beast." Defendants Palmisano and Judd were also seen answering telephones when the officers arrived. Defendant Rossetti said over another phone, "No business, cops are here." George Hurley of the Revere police, one of the raiding party, testified that he picked up a ringing phone several times and received requests to put bets on horses at various tracks.

The raiding officers gathered up and carted off to the Revere police station the paraphernalia found in the room. This was later used in some state court forfeiture proceeding, after which it was turned over to the federal authorities for inspection and possible use in federal prosecutions, and at the trial below the various items seized in the raid were introduced into evidence as exhibits. Prosecution witnesses, who testified to what they had seen in the room and seized, identified specifically some of the larger objects as having been among the property taken away. As to the great number of tally sheets, wagering slips, and other papers seized, the witnesses said on direct or cross-examination that they could not swear that the papers offered as exhibits were the identical ones seized in the raid, but that the various items were similar in size, appearance and kind to what had been taken. The government traced out the custody of the seized property from the time it was taken in the raid to the time it was offered in evidence, and the jury would have been warranted in finding that the papers in the exhibits were found in the cellar room. On various of

the numbers pool sheets or wagering slips, the names "Monge," "Sonny," "Lou," "Tom," and "Eddie" appeared. These were nicknames of the defendants Rossetti, Dunnett, Frongello, Daley, and Lavalle. The witness DeLuca, a special agent of the Intelligence Division of the Bureau of Internal Revenue, who examined the seized material, and who was duly qualified as an expert, testified that in his opinion the various papers seized were typical paraphernalia to be found in the headquarters office of a large-scale gambling business engaged in accepting bets on horse and dog races and numbers pools. The evidence indicated that 560 Winthrop Avenue was not a location where customers came to place bets or to collect winnings, but was a telephone center or central office of the gambling enterprise. In all the weeks of surveillance to which the officers testified, there was no testimony that anyone was seen coming to or out of the premises other than the defendants herein.

Testimony as to the hiring of the premises by Rossetti and the payment of two months' rent by Dunnett, the installation of the various tapped telephones, the statements made by various of the defendants who answered ringing telephones at the time of the raid, all this was admitted in evidence over objection, and the judge told the jury that such evidence could be applied as against each and every defendant whom they determined to have been a participant in a common gambling enterprise. Appellants insist that this ruling was in error, in the absence of a charge of conspiracy. We do not think that this is so. In *United States* v. *Olweiss*, 138 F.2d 798 (C.A. 2d, 1943), cert. denied 321 U.S. 744 (1944), Olweiss, Schwarz and Nass appealed from a conviction for concealing a bankrupt's goods from his trustee. In an opinion by Learned Hand, C.J., the court said (at 799-800):

"Schwarz and Nass complain that although they were not indicted for conspiracy, they were convicted as accomplices of Olweiss, and upon evidence admissible only against him. It was proper to charge them as principals—which they probably were in any event—even though they were only accessories. (§ 550, Title 18, U.S.C.A.); and any evidence admissible against Olweiss was admissible against them, so far as it consisted of conduct in furtherance of the joint venture in which all three were engaged. The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

More broadly, the defendants seem to have asserted that the exhibits seized in the raid, and the testimony of the officers with reference thereto, should not have been admitted into evidence for any purpose, for they moved "that all the documentary evidence consisting of papers, racing sheets (Armstrongs), race track programs, and all articles taken from the room located at 560 Winthrop Avenue, Revere, Massachusetts, and all oral evidence relating to the same be stricken from the record." This motion the court quite correctly denied. The government of course had to prove that a gambling "business" as defined in the statute was being conducted at 560 Winthrop Avenue. This was a necessary element in the required proof as against each of the seven defendants, and there is no doubt that such element was established by overwhelming proof. In addition, in order to warrant a conviction of each of the

defendants of the offenses charged, the government had to satisfy the jury that each defendant, individually, was engaged in such business. The judge charged, as requested by the defense, that the "mere fact that an individual was found in a place where papers and other objects, allegedly used in accepting wagers, were also found, is not sufficient of itself to convict the defendant of the offense set forth in the Information." On the other hand, the court charged, as requested by the government, and without objection by the defense so far as appears, that to be "engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business."

In other words, as the case was presented to the jury, the evidence pointing to the existence of a gambling "business" on the premises was in effect of no application to any individual defendant, unless the jury should determine that such defendant, individually, was engaged in the business, as defined. The defendants were entitled to no more than that.

The evidence, which we have not bothered to recite in full detail, was sufficient to warrant a finding, as to each defendant, individually, that he was engaged in the described activities.

Perhaps the point most insistently urged on these appeals is that "forensic misconduct" of the judge throughout the

trial resulted in a denial of due process and an unfair trial to the appellants. To assess confidently the validity of this sort of attack upon the trial judge, it is necessary to read the voluminous transcript from cover to cover. This we have done, and our examination of the record has satisfied us that appellants' criticisms of the fairness of the trial judge are entirely unwarranted.

The judge had a lot to say throughout the trial; and no doubt much of his comments and questioning of witnesses was superfluous. But this, in itself, does not constitute reversible error, however much it may have resulted in undue padding of the transcript. There were many exchanges between the court and defense counsel in which the badinage back and forth was obviously friendly and good-natured. But we find nothing to indicate that the purpose or effect of the numerous interventions by the trial judge was other than to assure that the cases be fairly presented and determined by the jury, shorn of extraneous issues.

In fact, no evidence was put in on behalf of the defendants. At the conclusion of the case for the prosecution the defense rested. Counsel for the defendants concentrated on objections to the introduction of evidence and on attempts to discredit government witnesses in cross-examination.

Much is made of alleged misconduct of the judge during the direct and cross-examination of the government witness Rubin, who was one of the neighbors whose telephones were tapped. Rubin was evidently a reluctant witness, and the judge's incredulity was aroused by Rubin's bland protestations of ignorance of what was going on. The judge questioned him vigorously as to why he had not notified the telephone company or the police when he found that his wires were being tapped. To his answer that he was "afraid" the judge asked whether he meant "physical fear." Rubin replied, clearly enough, that he meant only

"mental fear"—fear of being evicted by his landlord on account of being "involved" in a dubious transaction. The prosecutor having asked Rubin on direct examination whether he had been put under any undue "pressure" as a result of his pre-trial visit to the office of the United States Attorney, defense counsel picked this point up on cross-examination and sought to make something of it. But before Rubin stepped down from the witness chair, due to the combined efforts of the prosecutor and the judge Rubin made it clear that the United States Attorney had been "very nice" to him, had not threatened him, had sought to explain to him his rights under the Fifth Amendment, and finally had suggested to him that he had better go and discuss his affairs with his own lawyer. Read in its entire context, the testimony of Rubin, which in fact was of little or no importance to the prosecution, discloses no impropriety on the part of the trial judge.

In an effort on cross-examination to discredit the testimony of Sergeant Cosgrove, defense counsel sought to imply that Cosgrove was guilty of something reprehensible in extending his police activities outside the limits of the city of Cambridge. There was also a transparent effort to stir up discord between the Cambridge police and members of the Revere police force who took part in the raid and were to appear subsequently as government witnesses, by questions designed to elicit from Cosgrove the admission that he had extended his surveillance to Revere without notifying the Revere police, and had gone to the District Attorney for Suffolk County, because of a lack of trust on his part of the Revere police.

Defense counsel also made a great pother about what was at most an inconsequential variance in detail between the testimony of Sergeant Cosgrove and of government witness Galvin of the Revere police. Cosgrove had testified that

when the raiding party burst into the room he had observed the defendant Lavalle sitting at the end of the table with "an Italian roll of some kind with a piece of cheese and some other stuff in it in his right hand, leaning over the table, and in his left hand he had the receiver of a telephone." He also testified that there "was some food on the center of the table." Subsequently Officer Galvin testified to what he had observed in the raid. In the course of his cross-examination he said that he observed Mr. Lavalle eating "veal cutlets." In answer to a question by defense counsel, Galvin stated that he had informed the prosecutor at an interview prior to the trial that the defendant Lavalle was eating veal cutlets. Defense counsel told the court that he was "impeaching the United States Attorney for suppressing that evidence." The trial judge reacted sharply to this suggestion of reprehensible conduct on the part of the prosecutor.

In the foregoing, and other instances that could be mentioned, there is no doubt that the intervening comments and questions by the judge took off some of the bloom from these various trial maneuvers. But defendants in a criminal case do not have a right to insist that the judge must sit on the bench, mute and inert, while defense counsel possibly confuse the jury by injecting spurious issues of the "red-herring" variety.

Several times throughout the trial, the patience of the judge was sorely tried by repeated refusals of the counsel for the defense to accept his rulings of law. Nevertheless he many times cautioned the jury that they should not hold it against the defendants if tempers had occasionally flared up during the long trial, that defense counsel were distinguished lawyers and men of integrity and that when the judge found it necessary to make a ruling against them, the jury should not take this to the prejudice of the de-

fendants or allow themselves to be deflected from their duty to keep an open mind until all the evidence was in and then to make their determination solely on the basis of the evidence submitted, under the guidance of the instructions of law to be given by the court.

Numerous other minor points are urged by appellants, but they are not deserving of specific comment. The defendants were convicted after a fair trial, and we have found no ground for reversal.

The judgments of the District Court are affirmed.